

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 330 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

PRABHUDAS R PATEL

Versus

HEIRS OF PATEL MOTIBHAI B

Appearance:

MR RS PANDYA for Petitioners
MR J M PATEL for Respondent No. 1

CORAM : MR.JUSTICE S.D.SHAH
Date of decision: 04/07/97

ORAL JUDGEMENT

1. Petitioners are the original defendants who are aggrieved by the order passed below Exhibit 29 by the Second Joint District Judge, Baroda, dated 2nd of December, 1991 in Civil Appeal No. 188 of 1986.

2. It appears that the original plaintiffs instituted the Regular Civil Suit No. 1511 of 1983 in the court of Civil Judge, Senior Division for declaration of his ownership right over the suit land bearing Survey No. 791 admeasuring 1 acre 12 gunthas, inter alia, contending that the plaintiffs have jointly purchased the said property by oral sale in the year 1964 - 65 and that thereafter a writing was executed on a stamp paper in the year 1968. It is their say that thereafter the said property was in their possession as owner absolutely and that they have jointly become the owner of the said property. In para-5 of the plaint, they claim that they reserve their right to amend the plaint as they have referred to pendency of certain RTO proceedings in para 3.

3. By judgment and decree dated 30th April, 1986, Joint Civil Judge, Junior Division, dismissed the suit, whereupon Regular Civil Appeal No. 188 of 1986 was preferred in the court of District Judge, Vadodara. In such appeal, during the pendency of appeal, an application for amendment was made at Exhibit 29 seeking to amend the original plaint so as to add para 1A to 1S in the plaint after para-1 and Para 4A after para-4 and Para 6A(1) in the relief clause after para 6. By the proposed amendment, the plaintiffs - appellants, inter alia, wanted to contend that by agreement to sell dated 22nd of May, 1968, for an amount of Rs. 40,001/defendants agreed to sell the above said property and that the said amount was wilfully paid to the defendants and the plaintiffs were put into possession of the land, but the registered sale deed was to be executed thereafter and that the same was not executed. They, therefore, prayed that they are entitled to a decree of specific performance of an agreement to sell dated 22nd May, 1968 calling upon the defendants to execute the registered sale deed and that partially the averments in connection therewith were already made in the plaint.

4. It is no doubt true that the plaint was drafted half heartedly but one shall have to admit that mofussil pleading is not as perfect as it should be. The plaint undoubtedly refers to the oral agreement of sale and subsequent agreement reduced to writing for an amount of Rs. 40,001/- and it also refers to the fact that the said amount was paid and that plaintiffs were put into independent possession of the land in question and that they have accordingly become the owners of the land. It was also stated that even the land revenue on such land was being made by one of the plaintiffs and that the land

was in their possession since last more than 20 years as owners thereof. Unfortunately, the relief of specific performance was not prayed for and only relief of declaration of ownership of the land in question was prayed for.

5. In the application for amendment, the plaintiffs had set out by way of proposed amendment, the various details which transpired between the parties and the rights of the plaintiffs to get their specific performance of an agreement to sell by calling upon the defendants to execute the registered sale deed and to protect their possession. As even under the doctrine of part performance, they have been put into possession of the land in question which is supported even by the revenue record. According to the plaintiffs, the aforesaid facts were undoubtedly existing but such facts were not clearly stated in the plaint and the amendment as such would not take the defendants by surprise or would not in any way prejudice any of the defences of the defendants.

6. The lower appellate court being Second Joint District Judge, Baroda by judgment and order dated 2nd December 1991 allowed the amendment of the plaint with costs of Rs.100/-.

7. Being aggrieved by the aforesaid order granting amendment, the petitioner has come into revision before this court under Sec. 115 of the C.P. Code. Mr. R.S. Pandya, learned counsel for the original defendants has vehemently submitted before this court that amendment of this nature at a belated stage should not be granted as from the averments made in the plaint it becomes clear that the plaintiffs were aware of an agreement of sale and subsequent agreement of sale alleged to have been reduced to writing and that plaintiffs were put into possession of the land in question and, therefore, they ought to have filed the suit for specific performance. Granting amendment of the plaint at a belated stage would adversely and prejudicially affect the rights of the defendants to defend the suit and would cause greater hardships to the defendants or would defeat the right of the defendants which they have already accrued.

8. Mr.J.M. Patel, learned counsel for the original plaintiffs has supported the order of the courts below and relied upon various decisions of the Supreme Court under Order 6 Rule 17 of the Code of Civil Procedure and more particularly in the case of JAI JAI RAM MANOHARLAL v. NATIONAL BUILDING MATERIAL SUPPLY, GURGAON, reported

in AIR 1969 SC 1267.

9. The law as to amendment of plaint under Order 6 Rule 17 of the Code of Civil Procedure has been well stated in the two earlier decisions of the Supreme Court reported in L.J. LEACH & CO. LTD. v. M/s JARDINE SKINNER & CO., reported in AIR 1957 SC 357 and P.H. PATIL v. KALGONDA SHIDGONDA PATIL, reported in AIR 1957 SC 363. This court has occasion to consider the law as to amendment in detail in the case of BAKUNVARBA JAKHUBHAI JADEJA v. CHANDUBHA GUMANSING JALA reported in 1996 (2) GLH 372. Ordinarily, the amendment of plaint is to be allowed unless it is likely to cause prejudice to the defence of the defendant. As per the requirement, under Order 6 Rule 17 of the C.P. Code, if the amendment is one which is required in the interest of justice, court has discretion and jurisdiction to allow such amendment. The court has also observed that it is no doubt true that the courts would as a rule decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered. That factor, however, does not affect the power of the court to order amendment, if that is required in the interest of justice.

10. Ultimately, it is exercise of discretion by the court and that discretion shall have to be judicially exercised. All amendments ordinarily are required to be allowed which satisfy the two conditions, first not working injustice to other side, and second of being necessary for the purpose of determining the real questions in controversy between the parties.

11. In the present case, from the initial averments made in the plaint, it becomes clear that the plaintiffs referred to and relied upon the factum of an agreement to sell which is reduced to writing. The plaintiffs also referred to the fact that they were put into possession of the lands in question pursuant to such agreement. Unfortunately, the relief claimed was not that of specific performance of an agreement but was that of declaration only. It was therefore not a case of initial lapse. The defendants then fully knew the factum of agreement to sell having been executed by them in favour of the plaintiffs and the possibility of plaintiffs suing for specific performance of agreement to sell, the defendants cannot be said to be taken by surprise proposed amendment. In the aforesaid view of the matter and particularly, the subsequent decision of the Supreme

Court, the leniency is shown by the Supreme Court in granting amendment even at the belated stage when the proceedings were pending before the Supreme Court, I am of the opinion that, the lower appellate court was fully justified in granting the amendment. It is no doubt that when the amendment is belatedly moved, court has discretion to grant amendment subject to certain terms and conditions. In the facts and circumstances of the case, in my opinion, since the amendment is moved at a belated stage, the plaintiffs should be called upon to pay additional cost of Rs. 2,000/- (Rupees two thousand only) to the defendants within a period of twelve weeks from today.

12. In the result, this Civil Revision Application fails and the order passed by the trial court is upheld subject to the aforesaid modification about the payment of cost. Rule is accordingly made absolute with independent order of costs.

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